

HEARING
SUBCOMMITTEE ON ELECTIONS
OF THE
COMMITTEE ON HOUSE ADMINISTRATION
2022 MIDTERMS LOOK BACK SERIES: SUCCESS IN THE 2022 MIDTERMS
MARCH 10, 2023

MINORITY QUESTIONS FOR THE RECORD
FOR
MR. DAMON HEWITT
PRESIDENT AND EXECUTIVE DIRECTOR
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

- 1. Mr. Hewitt, the spread of election-related mis- and disinformation has fueled conspiracy theories and made it difficult for voters to receive accurate information about elections and their voting options. We also saw evidence that mis- and disinformation campaigns were targeted at communities of color. In a case brought by the Lawyers' Committee, a federal judge recently ruled that defendants violated the Voting Rights Act, the Ku Klux Klan Act, and other federal and state civil rights laws by targeting Black voters with intimidating robocalls before the 2020 General Election.**
 - a. How has the spread of false or misleading election information been targeted at Black voters and other communities of color?**

Bad actors often target Black voters and other communities of color with election mis- and disinformation that is tailor-made to get their attention and prey on justified fears. For example, in the case described above, *National Coalition on Black Civic Participation v. Wohl*, the Lawyers' Committee sued two citizens who made robocalls targeted at Black voters, claiming to be a woman with a linguistically Black name, and telling them that if they voted by mail, the police would track them down, debt collectors would come after them, and the CDC would force them to take the vaccine. These calls used threats that echo historical ills specific to Black people, like the Tuskegee experiment and over-policing of communities of color, to target them.

- b. How has mis- and disinformation been weaponized to attempt to intimidate voters?**

The disinformation above intentionally played into stereotypical fears that Black communities had during the pandemic and discouraged them from exercising their right to vote. Not only is this kind of disinformation plainly false - it is dangerous and specifically meant to suppress Black electoral power. This weaponization of disinformation isn't limited to Black voters, but much of the mis-information and dis-information we've seen attempts to prey upon communities of color by using facets of their identity and issues relevant to their communities to make them

apprehensive about voting, confused about where they can vote, or misled about when or how to vote. This is not only gravely wrong, but also illegal and discriminatory.

c. Can you elaborate on the court's ruling? How did the actions of the defendants in the case violate federal law?

On March 8, 2023, the United States District Court for the Southern District of New York granted summary judgment for Plaintiffs on liability. The district court ruled that the two election robocall fraudsters we sued in 2020 violated the Voting Rights Act, Ku Klux Klan Act, and other federal and state civil rights laws with their intimidating robocalls targeting Black voters. Using a recorded script that falsely suggested law enforcement, credit card companies, and the CDC would use mail-in voting data to track people down for arrest, debt collection, and involuntary vaccination, Defendants Jacob Wohl and Jack Burkman broadcasted approximately 85,000 calls across five states. These robocalls told voters to “beware of vote by mail” and instilled fear, stress, and anxiety among voters. They also forced civil rights organizations to reallocate critical resources to counter the robocalls just weeks before the election.

The court recognized that these robocalls were an illegal and discriminatory voter suppression tactic that targeted Black voters and granted the motion for summary judgment that we filed on behalf of the National Coalition on Black Civic Participation and individual voters who received the robocalls. The New York Office of the Attorney General also joined the case on behalf of the People of New York as co-plaintiffs. In his ruling, U.S. District Court Judge Marrero said the Defendants’ actions embodied “an attempt to disturb the election process itself” and concluded that Defendants’ conduct was “intimidating, threatening, or coercive towards voters, especially Black voters.” We co-counseled this case along with our pro-bono partners at Orrick, Herrington & Sutcliffe LLP.

The case is scheduled to go to trial on damages in August 2023.

2. Mr. Hewitt, we are approaching the ten-year anniversary of *Shelby County v. Holder*.

a. How have the Supreme Court decisions in *Shelby* and then in *Brnovich v. DNC* negatively impacted voters and shifted the burden from the states to voters and litigators?

Racial discrimination in voting diminishes our democracy. The Voting Rights Act of 1965, and particularly Section 2 and Section 5, have been indispensable tools in the fight against such discrimination. Section 5 has already been effectively eviscerated by the Supreme Court’s decision in *Shelby County v. Holder*, which gutted the preclearance formula used in Section 5. By making jurisdictions with a history of discrimination preclear changes to their election system, the burden was on states to show that their laws and maps were non-discriminatory before they were adopted. Now, litigators and voters must combat suppressive laws after they take effect. Even if the challenges are successful, discriminatory harm has been done to voters in the meantime.

The Supreme Court’s ruling in *Brnovich v. DNC* was especially painful because in *Shelby County v. Holder*, the Court lifted up Section 2 of the Voting Rights Act as still being available to plaintiffs seeking to sue over racially discriminatory voting laws after it immobilized Section 5. Yet in *Brnovich*, the Supreme Court weakened Section 2 as well. Specifically, in *Brnovich v. DNC*, the Supreme Court made it unnecessarily more difficult for plaintiffs to bring cases under the portion of Section 2 of the Voting Rights Act that governed vote denial “results” cases. Prior to the U.S. Supreme Court’s decision in *Brnovich*, Section 2 of the VRA functioned as a vehicle for civil rights litigants to stop discriminatory voting laws after they had already gone into effect. But after *Brnovich*, plaintiffs may be required to address unrealistic and nonevidence-based factors such as whether the practice they are challenging would have been discriminatory prior to 1982 – a year before the internet was even invented.

The result has emboldened states who seek to make voting harder. Throughout 2021 and 2022, states enacted bills banning or limiting the use of drop boxes for mail-in ballots, restricting early voting hours, shortening the window of time that voters had to request – and otherwise limiting use of – absentee ballots, creating new criminal and financial penalties for election administrators, and giving partisan poll watchers unfettered access to the polls. Restrictive voting laws passed in 2021 and 2022 had a meaningful impact on their intended targets—voters of color.

Texas rejected roughly one out of every eight mail ballots in the 2022 primaries due to onerous administrative requirements, such as requiring that voters list the same identification number they originally used to register; the impact fell disproportionately on Latino and Black voters. Georgia passed new restrictive measures that targeted and limited voting methods, like early in-person voting, voting by absentee ballot, and ballot drop boxes, all of which were used much more extensively by voters of color than voting in-person on recent election days.

Both Georgia and Texas were subject to preclearance prior to the Supreme Court’s decision in *Shelby County*. If preclearance still in effect, neither Georgia’s omnibus voting bills nor Texas’ would have been enacted without approval from either the Department of Justice or a three-judge panel from the U.S. District Court for the District of Columbia.

b. Depending on the outcome of *Merrill v. Milligan* and its impact on Section 2 of the Voting Rights Act, what is the potential impact on voters, and what can Congress do to protect access to the ballot?

If the Court accepts Alabama’s argument in *Merrill v. Milligan*, it will reject 40 years of precedent and narrow the availability of the Voting Rights Act provides as a remedy for racial discrimination in the redistricting process. The State of Alabama had the obligation – under settled legal standards – to create an additional Black majority district, but refused to do so, robbing Black voters of their right to participate equally in the political process. An adverse decision in *Merrill v. Milligan* will further neuter the Voting Rights Act, which has for decades helped to ensure that Black voters and other voters can exercise political power and self-determination in choosing their representatives.

Congress must restore the full protections of the Voting Rights Act of 1965 by undoing the damage the Supreme Court has already done to Section 4(b), Section 5, and Section 2 of the landmark legislation. The Supreme Court may weaken the Voting Rights Act even further with its decision in *Merrill*, so it is imperative that the legislation Congress passes be responsive to it. It is incumbent on Congress to repair any damage to the Voting Right Act, including any damage the Court creates in the wake of a *Merrill* decision.

3. Mr. Hewitt, in your written testimony you discuss how overall voter turnout numbers do not tell the whole story as to whether or not a law or voting procedure change is restrictive, suppressive, or has a discriminatory impact—that we must look below the surface-level numbers and examine gaps in participation.

a. Can you discuss further what the racial disparity in turnout was in the last election?

Racial disparities in voting seem to have grown across states. This can be seen best in those states where voters are asked to provide race data when they register to vote.

In the November 2022 election, Georgia had a 13.3 percentage point gap between White (58.3%) and Black (45.0%) turnout of registered voters, which was significantly greater than the 8.3 percentage point gap (62.2% to 53.9%) of the previous midterm election in 2018. 14 Notably turnout amongst both Black and White voters fell in 2022 as compared to 2018 despite the significant interest in Georgia elections.

In North Carolina, 58% of White registered voters voted in the 2022 general election compared to 41.8% percent of Black or African American voters. In North Carolina, White voters had the highest voter turnout percentage compared to all other racial groups. Statewide, the gap in turnout between White and Black voters in midterms is soaring, growing from 5 percentage points in 2014 and 8 points in 2018, compared to a roughly 16 percentage point gap in 2022.

My home state of Louisiana also had a shameful racial disparity in participation. 52.56% of White eligible voters cast a ballot in 2022 compared with only 37.85% of eligible Black voters. Further, some states that have passed suppressive voting laws have seen overall turnout fall. In Florida, sixty-three percent of voters voted in the 2018 general election compared to 54% in 2022.³¹ Ohio had similar trends, with a fifty-five percent turnout rate in 2018, and then dropping down to fifty-two percent in 2022. An estimated 61.2 percent of eligible White voters participated in Ohio's 2022 election, compared to just 26.2 percent of eligible Black voters, a 35-point difference.

In South Carolina turnout among voters of color was the lowest it had been in at least a generation, according to South Carolina election participation data.¹ In the Palmetto State, while overall turnout among registered voters was 45.9 percent, White voter turnout was slightly higher

¹ 35 Zak Koeske, Non-white SC voter participation plummeted in 2022 midterms, THE STATE (Dec. 31, 2022), <https://www.thestate.com/news/politics-government/article270262872.html>.

at 50.6 percent and non-White turnout was significantly lower at 34.99 percent. That is a greater than 15 percentage point gap in turnout between White voters and voters of color.

b. Why is the racial disparity gap in participation a better indicator when measuring elections than overall turnout?

The point of voter suppression has always been to stop certain portions of the electorate from voting, commonly communities of color. The intent is to target voters of a particular group and have them vote at lower rates than others, in order to manipulate the outcome of elections.

Overall voter turnout metrics cannot tell the whole story when the intent of suppressive voter legislation is to make it more difficult to vote for a targeted minority. According to Bernard L. Fraga, a professor, and elections expert “changes in [overall] voter turnout are an incomplete metric for gauging the impact of election law policies or changes in policies on the burdens citizens face.”² That is because voters take steps to counter barriers to voting, and those steps are “not evidence that the barrier does not exist.” Just because voters manage to show up to vote, does not mean that they have been unnecessarily burdened and -worse – burdened in a racially discriminatory manner in connection with their right to vote. That expensive and time-consuming counter-mobilization efforts to combat burdensome and discriminatory voting practices may yield success does not make such practices legally or morally right.

Comparing the rates of participation between racial and ethnic groups is a better metric for examining our elections, because burdens designed to fall more heavily on particular people will be more likely to be seen than when only comparing the rates at which everyone, including those not targeted by barriers, vote.

4. Mr. Hewitt, requiring voters to present photo identification when voting has been raised as a measure necessary to increase voter confidence in elections and prevent fraud.

a. How do voter ID laws impact low-income communities and communities of color?

Voter ID laws have been shown to have a disproportionate impact on voters of color. For example, in *Veasey v. Abbott*, where the U.S. Court of Appeals for the Fifth Circuit found that Texas’ 2013 Photo ID law was racially discriminatory, the plaintiffs presented evidence showing that 1.2 million eligible Texas voters lacked a form of government-issued photo ID that would have been accepted under the new law — and minorities would be hit the hardest. The court credited testimony that African-American registered voters were 305 percent more likely and Hispanic registered voters 195 percent more likely than white registered voters to lack photo ID that can be used to vote. Voter ID laws also often play favorites, accepting types of IDs likely to be carried by some groups of the electorate more than others. They also are harder barriers to

² 6 Sur-Rebuttal Report of Bernard L. Fraga, In re Georgia Senate Bill 202, No. 1:21-CV-01229-JPB, 2022 WL 3573076 4 (N.D. Ga. Aug. 18, 2022)

overcome for those who rely on public transportation to get an ID, don't already own a certain type of ID, or cannot afford to miss work or childcare duties to get the right type of ID.

- b. During the hearing, Secretary Ardoin raised that Louisiana has had a voter ID law in place for many years and that the law was precleared by the Clinton Administration Department of Justice. How did the preclearance process protect voters from discriminatory voter ID laws? How does the lack of preclearance put voters at risk of being subjected to voter ID laws that have a discriminatory impact?**

Louisiana's law was only precleared because in Louisiana, voters are allowed to present alternative forms of identification if they do not have a photo ID. This is made clear on the Louisiana Secretary of State's website: "If you do not have a driver's license, Louisiana Special ID, a United States military identification card that contains your name and picture or some other generally recognized picture ID that contains your name and signature, you may still cast your vote by signature on a voter affidavit."³

This distinction shows exactly why preclearance was so important. Were it not for preclearance, Louisiana may have tried to pass a stricter version of its voter ID law as many states have done since the Supreme Court issued its decision in *Shelby County*.

- c. Is there any evidence that there is widespread fraud that would be prevented by voter ID laws?**

No. There is no evidence that voter or photo ID laws prevent widespread voter fraud.

³ Vote on Election Day, Louisiana Secretary of State, (last visited Apr. 24, 2023)
<https://www.sos.la.gov/ElectionsAndVoting/Vote/VoteOnElectionDay/Pages/default.aspx>.